

UNITED STATES BANKRUPTCY COURT  
DISTRICT OF MINNESOTA  
THIRD DIVISION

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In re:

BKY 04-34446 GFK

*James M. Mulvihill and  
Kathleen M. Mulvihill,*

Chapter 13 Case

Debtors.  
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**NOTICE OF HEARING AND MOTION FOR CONVERSION OF CHAPTER 13 CASE  
TO CHAPTER 7 CASE**

TO: All parties in interest pursuant to Local Rule 9013-3.

1. Jasmine Z. Keller, Chapter 13 Trustee (the "Trustee"), moves the court for the relief requested below and gives notice of hearing.

2. The court will hold a hearing on this motion at 11:15 a.m. on October 25, 2004, in Courtroom 228B, United States Courthouse, 316 North Robert Street, St. Paul, Minnesota.

3. Any response to this motion must be filed and delivered not later than 11:15 a.m. on October 22, 2004, which is 24 hours prior to the time set for hearing or filed and served by mail not later than October 20, 2004, which is three days before the time set for the hearing (excluding Saturdays, Sundays, and holidays). **UNLESS A RESPONSE OPPOSING THE MOTION IS TIMELY FILED, THE COURT MAY GRANT THE MOTION WITHOUT A HEARING.**

4. This court has jurisdiction over this motion pursuant to 28 U.S.C. §§ 157 and 1334, Bankruptcy Rule 5005 and Local Rule 1070-1. This proceeding is a core proceeding. The petition commencing this Chapter 13 case was filed as a partial filing on July 30, 2004. The Debtors' Schedules, Statement of Financial Affairs, and Chapter 13 Plan were filed on August 2, 2004. The case is now pending in this court.

5. This motion arises under 11 U.S.C. § 1307(c) and Bankruptcy Rule 1017. This motion is filed under Bankruptcy Rule 9014 and Local Rules 9006-1, 9013-1 through 9013-5, and such other Local Rules as may pertain. **MOVANT REQUESTS RELIEF WITH RESPECT TO CONVERSION OF THIS CASE TO A CASE UNDER CHAPTER 7.**

6. The Debtors' Schedule A shows that they reside in separate households on two distinct parcels of real estate, but it appears that they own each parcel jointly. Debtor James M.

Mulvihill ("Mr. Mulvihill") claims a homestead at the premises located at 921 South Elm Street, Belle Plaine, MN, legally described as Lot Six, Block 4, Wildflower Ridge Subdivision #1, Scott County, Minnesota, valued at \$176,000 in Schedule A. According to Schedule D, the property is encumbered by a first mortgage in favor of Wells Fargo Home Mortgage in the amount of \$146,000, and a second mortgage in favor of Wells Fargo in the amount of \$39,000. As such, there is no apparent equity in the property, based upon the value listed in Schedule A.

7. Based upon Scott County Property Information, the estimated market value of the property for 2004, payable in 2005, is \$201,800. A copy of the Scott County Property Information Search Results is incorporated herein and attached hereto as Exhibit A. Based upon Scott County's valuation, the Debtors have an equity interest in the property of at least \$16,800. It is the Trustee's position that the Scott County valuation is a more accurate assessment of their equity in the property. In the Amended Schedule C filed September 8, 2004, the Debtors claim an equity interest in the property of \$17,000.

8. Debtor Kathleen M. Mulvihill ("Mrs. Mulvihill") claims as her homestead the premises located at 20529-485<sup>th</sup> Street, McGregor, MN, legally described as Lot 8, Block 31, Indian Portage, Shamrock Township, Aitkin County, Minnesota, valued at \$117,400 in Schedule A. According to Schedule D, the property is encumbered by a first mortgage in favor of Wells Fargo in the amount of \$116,500. As such, the Debtors have an equity interest in the property of at least \$900.

9. Based upon the Scott County record attached as Exhibit A and the Aitkin County Treasurer's Office, it appears that the Debtors have a joint interest in both parcels of real estate. Based upon the Amended Schedule C filed September 8, 2004, the Debtors have claimed an interest in two parcels of real estate under 11 U.S.C. § 522(d)(1) to the full amount of the allowable exemption. Under 11 U.S.C. § 522(d)(1), a debtor may exempt an interest in real or personal property that a debtor or a dependent of the debtor "uses as a residence" to a maximum of \$18,450. *11 U.S.C. § 522(d)(1)*. The extent of an allowable exemption may be measured by reference to the law of the forum state, in this case Minnesota, which requires that debtors both own and occupy property as a homestead in order to exempt it from the claims of creditors. *Minn. Stat. § 510.01, 510.02. In re Johnson*, 375 F.3d 668 (8<sup>th</sup> Cir. 2004). As such, Mr. Mulvihill cannot claim an exemption for the property Mrs. Mulvihill occupies as a residence under 11 U.S.C. § 522(d)(1), and Mrs. Mulvihill cannot claim an exemption for the property that Mr. Mulvihill occupies as a residence under 11 U.S.C. § 522(d)(1). Minnesota debtors who share an ownership interest in more than one parcel of real estate can claim an exemption for their ownership interest in a parcel of real property they use as a residence under 11 U.S.C. § 522(d)(1), but as to the interest of another party with joint ownership, are limited to an exemption claim under 11 U.S.C. § 522(d)(5), within the monetary limits imposed by that section of the Statute.

10. Prior to the filing, based upon Schedule B, Mrs. Mulvihill was involved in litigation with a defendant identified as PFR. According to Schedule B, the basis for the litigation was an asserted tort claim by Mrs. Mulvihill for sexual harassment. An out-of-court settlement was reached, in which the defendant paid Mrs. Mulvihill a net settlement in the amount of \$46,300. On the Amended Schedule C filed September 8, 2004, the Debtors claimed

the entire net settlement amount of \$46,300 as exempt as pursuant to 11 U.S.C. § 522(d)(11)(E).

11. Based upon the documents, only Mrs. Mulvihill as the prevailing plaintiff in the litigation is entitled to the proceeds of the net settlement. Mr. Mulvihill is not entitled to exempt an interest in a settlement in favor of Mrs. Mulvihill.

12. Based upon the plain language of 11 U.S.C. § 522(d)(11)(E), an exemption is allowed for “a payment in compensation of loss of future earnings of the debtor or an individual of whom the debtor is or was a dependent, to the extent reasonably necessary for the support of the debtor and any dependent of the debtor.” 11 U.S.C. § 522(d)(11)(E). There is no evidence in the record to show that the entire net settlement is due to lost future earnings, and no evidence supporting a conclusion that its retention will be reasonably necessary for the support of the debtor and any dependent of the debtor. Based upon the description of the litigation in Schedule B, at least a portion of the net settlement is attributable to infliction of emotional distress, and there may be allowances for such items as pain and suffering, general damages, special damages, etc. Accordingly, there may be a significant portion of the settlement that cannot be exempted under 11 U.S.C. § 522(d)(11)(E). Mrs. Mulvihill could exempt any portion of the net settlement attributable to allowances unrelated to lost future earnings under 11 U.S.C. § 522(d)(5), within the monetary limits of that portion of the Statute. Without additional evidence to the contrary in the record, it seems probable that a portion of the settlement does not qualify for exemption under 11 U.S.C. § 522(d)(11)(E). There is no evidence in the record to support the conclusory statement that the funds are necessary for the support of Mrs. Mulvihill either.

13. The §341 meeting of creditors was set for September 15, 2004 at 11:30 a.m.

14. The Debtors failed to appear at the meeting of creditors.

15. The Debtors failed to make the initial payment proposed by the plan within 30 days after the plan was filed in violation of 11 U.S.C. § 1326(a)(1).

16. The Debtors’ proposed plan, ¶ 1.b., obliges the Debtors to pay the Trustee “\$626.37 per month for 36 months, for a total of \$22,549.32 over the 36-month term of the plan.

17. Proposed distributions under the plan are as follows:

Attorneys’ Fees	\$ 1,250.00
Trustee’s Fees (at 6.3%)	1,276.38
Ford Motor Credit	11,872.36
Unsecured Creditors	8,150.58

18. Based upon estimated unsecured claims in the case of \$71,395, the general unsecured creditors will receive a distribution of no more than 11%.

19. To the extent that the Debtors have claimed exemptions in excess of the amounts allowed by the applicable exemption statutes, there exist non-exempt assets capable of administration by a Chapter 7 Trustee.

20. The Chapter 13 Trustee, as a non-liquidating trustee, cannot prevent dissipation of estate assets by the Debtors by taking control of assets, as would a liquidating trustee.

21. Under 11 U.S.C. § 1307(c), on request of a party in interest and after notice and a hearing, the court may convert a case under Chapter 13 to a case under Chapter 7, or may dismiss it, whichever is in the best interests of creditors and the estate, for cause. According to Local Rule 1017-2(a), a motion to dismiss or a motion to convert a case shall be deemed a motion either to dismiss or to convert, whichever is in the best interests of creditors and the estate.

22. The Trustee contends that conversion of this case, rather than dismissal, is in the best interests of creditors and the estate. A Chapter 7 trustee will be in a position to take control of assets that otherwise might be dissipated, examine the Debtors concerning estate funds received by the Debtors pre- and post-petition, to recover such funds as may remain, and to bring appropriate avoidance actions to recover improper post-petition transfers made by the Debtors, if any.<sup>1</sup>

WHEREFORE, the Chapter 13 Trustee moves the court for an order converting this case to a case under Chapter 7 of Title 11, United States Code, and such other relief as may be just and equitable.

Jasmine Z. Keller, Chapter 13 Trustee

Dated: September 17, 2004

Signed: /e/ Margaret H. Culp  
Thomas E. Johnson, ID # 52000  
Margaret H. Culp, ID # 180609  
Counsel for Chapter 13 Trustee  
310 Plymouth Building  
12 South 6th Street  
Minneapolis, MN 55402  
(612) 338-7591

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<sup>1</sup> The Debtors may attempt to dismiss this case upon receipt of the Trustee's Objection to Claimed Exempt Property and the instant Motion For Conversion Of Chapter 13 Case To Chapter 7 Case. Such an attempt should fail based upon *Molitor v. Eidson (In re Molitor)*, 76 F3d 218 (8<sup>th</sup> Cir. 1996). The merits of the Trustee's Objection and Motion to Convert should be heard rather than thwarted by a voluntary dismissal by the Debtors following the filing of the Trustee's pleadings.

### **VERIFICATION**

I, Margaret H. Culp, employed by the Chapter 13 Trustee, the movant named in the foregoing notice of hearing and motion, declare under penalty of perjury that the foregoing is true and correct.

Executed: September 17, 2004

Signed: /e/ Margaret H. Culp



## Scott County Property Information Search Results

### General Property Information

Property ID:	20-058012-0
Roll Type:	Real Estate
Payable Year:	2004
Owner Name:	MULVIHILL,JAMES M & KATHY M
Property Address:	921 ELM ST S
City/State/Zip:	BELLE PLAINE MN 56011
Taxpayer Name:	MULVIHILL,JAMES M & KATHY M
Taxpayer Mailing Address:	
House Address:	921 ELM ST S
City/State/Zip:	BELLE PLAINE MN 56011

### Legal Description Information

Lot/Block/Plat#:	6 4 20058
Plat Name:	PLAT-20058 WILDFLOWER RIDGE SUBD #1
Section/Township/Range:	
Deeded Acres:	0.00
Legal Description:	SECT- TWP- RNG-

### Miscellaneous Information

School District:	716
Taxing District Code:	1501
Taxing District Name:	BELLE PLAINE CITY

### Valuation & Tax Information

EXHIBIT A

(The tax figure shown may or may not be calculated on the total estimated market value as shown. Programs such as This Old House, plat deferment,

limited market value and green acres may reduce the indicated market value to a taxable market value upon which taxes would be calculated.)

Estimated Market Value of Land:	\$40,000
Estimated Market Value of Building:	\$161,300
<b>Estimated Market Value Total:</b>	<b>\$201,300</b>
Total Net Taxes for Current Year:	\$2,127.00
Total Special Assessments Due for Current Tax Year:	\$5.00
Total Net Tax plus Special Assessments:	\$2,132.00
Outstanding Special Assessments:	\$0.00
Payments:	\$1,066.00
Green Acres:	
Ag Preserve:	

### **Tax Classifications**

Property Type:	RESIDENTIAL
Homestead Status:	Y
Exempt Status:	

### **Sales Information**

Last Qualified Sale:	08/31/2001
Amount:	\$187,290.00

### **Building Characteristics**

Type:	RES
Year Built:	2001
Architectural Style:	4 LVL SPLT
Foundation Size (Sq Ft):	1,396
Garage Size (Sq Ft):	636
Bedrooms:	3
Bathrooms:	2.50

CRV Search | Property Tax Estimator  
Property Tax Statement



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**MEMORANDUM IN SUPPORT OF MOTION TO CONVERT CASE**

FACTS

The Trustee relies upon the facts alleged in the accompanying motion and attachments, as well as the statements contained in the debtor's petition, statements and schedules on file herein.

LEGAL DISCUSSION

Section 1307(c) of the Bankruptcy Code permits the court to convert a case from Chapter 13 to Chapter 7, "for cause." A non-exclusive<sup>2</sup> list of grounds for dismissal or conversion is found in the statute, which requires the court to determine which course of action "is in the best interests of creditors and the estate."

1. Excessive Homestead Exemption Claims.

The Debtors claim of exemption for the entire value of the equity in each parcel of property in which the Debtors own jointly but do not reside together exceeds the allowable amount available under 11 U.S.C. § 522(d)(1), which reads in pertinent part: "[T]he debtor's aggregate interest, not to exceed \$17,425 (now \$18,450) in value, in real property or personal property that the debtor or a dependent of the debtor uses as a residence..." 11 U.S.C. § 522(d)(1). (*Emphasis added.*) Based upon the plain language of the Statute, Mr. Mulvihill may claim a maximum of \$18,450 as and for available equity in his personal residence; his interest in the residence occupied by Mrs. Mulvihill is limited to \$450 allowable under 11 U.S.C. § 522(d)(5). Mrs. Mulvihill may claim a maximum of \$18,450 in her personal residence; her interest in the residence occupied by Mr. Mulvihill is limited to the difference between his allowable claim of \$ and the remaining value of the equity in the property, if any, under 11 U.S.C. § 522(d)(5).

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<sup>2</sup> 11 U.S.C. § 1307(c) prefaces the list of grounds for dismissal or conversion with the word "including." According to 11 U.S.C. § 102(3), the words "'includes' and 'including' are not limiting."

Each Debtor's allowable exemption under 11 U.S.C. § 522(d)(1) and their respective allowable exemption amounts under 11 U.S.C. § 522(d)(5) are as follows:

Mr. Mulvihill: 11 U.S.C. § 522(d)(1)	\$ 8,150	50% of equity in his residence.
11 U.S.C. § 522(d)(5)	\$ 2,075	\$1,100 + \$975

Mrs. Mulvihill: 11 U.S.C. § 522(d)(1)	\$ 450	50% of equity in her residence.
11 U.S.C. § 522(d)(5)	\$10,225	\$9,250 + \$975

2. Exemption of Tort Claim Settlement.

As of the filing, and listed on Schedules B and C of the petition, Mrs. Mulvihill was entitled to receive a net settlement of \$46,300 on account of successful pre-petition litigation of a tort claim for sexual harassment and damages for intentional infliction of emotional distress after payment of attorneys' fees and federal and state tax liability. On Schedule C, the Debtors exempt the entire \$46,300 under 11 U.S.C. § 522(d)(11)(E). Under the plain language of the exemption statute, a debtor may exempt "a payment in compensation of loss of future earnings of the debtor or an individual of whom the debtor is or was a dependent, to the extent reasonably necessary for the support of the debtor and any dependent of the debtor..." 11 U.S.C. § 522(d)(11)(E). (*Emphasis added.*) There is no evidence in the record to support exemption of the entire settlement amount as and for loss of future earnings. The terms of the settlement may attribute portions of the recovery for other losses, such as pain and suffering, and general and special damages. Those provisions, if present, cannot be claimed as exempt under 11 U.S.C. § 522(d)(11)(E). To the extent a portion of the recovery is attributable to damages unrelated to lost future earnings, Mrs. Mulvihill would be limited to those amounts under 11 U.S.C. § 522(d)(5), to a maximum allowable exemption of \$10,225. There appears to be no basis for Mr. Mulvihill to exempt a portion of Mrs. Mulvihill's settlement.

3. Exemptions claimed in excess of the allowance under 11 U.S.C. § 522(d)(5).

The Debtors also claim an interest in an EROCA Pontoon Boat with 50-Hp. Johnson Outboard motor in the amount of \$5,000 under 11 U.S.C. § 522(d)(5). If the asset is jointly owned, as indicated in Schedule B, each Debtor can exempt up to \$2,500 in this asset. To the extent that the Debtors' exemptions are exhausted through claims of exemption in other assets, the exemption of the joint interest in this asset exceeds the amount allowable under the Statute.

The Trustee submits that conversion of this case to Chapter 7 is in the best interests of creditors and the estate, and that good grounds exist for such conversion. Based upon the schedules filed by the Debtors, it appears that they have claimed assets exempt in excess of the allowable amount available under 11 U.S.C. § 522(d)(1) and (d)(11)(E). Assets of a substantial value remain in the possession and control of the Debtors that may be swiftly dissipated if a liquidating trustee is not appointed to prevent such activity.

The size of the potential non-exempt estate militates in favor of conversion of this case to a case under Chapter 7. Converting the case to a case under Chapter 7 will enable the non-exempt estate, if any, to be liquidated for the benefit of creditors. Converting the case to a case

under Chapter 7 will enable a liquidating trustee to be appointed to take possession of the funds for the benefit of creditors and the estate. There may be avoidance actions available to the Chapter 7 trustee whereby transferred funds can be recovered, and the extent of the Debtors' nonexempt estate determined and administered by the Chapter 7 trustee.

Dismissal of the case at this juncture would, in effect, allow the Debtors to escape from supervision of the Bankruptcy Court with substantial sums of money that could be used to pay toward their indebtedness. As between the two remedies, conversion is clearly in the best interests of creditors.

### CONCLUSION

The Chapter 13 case should be converted to a case under Chapter 7 for cause.

Respectfully submitted:

Dated: September 17, 2004

Signed: /e/ Margaret H. Culp  
Thomas E. Johnson, ID # 52000  
Margaret H. Culp, ID # 180609  
Counsel for Chapter 13 Trustee  
310 Plymouth Building  
12 South 6th Street  
Minneapolis, MN 55402  
(612) 338-7591

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**UNSWORN DECLARATION FOR PROOF OF SERVICE**

I, Margaret H. Culp, employed by Jasmine Z. Keller, Chapter 13 Trustee, declare that on September 17, 2004, I served Notice of Motion for Expedited Hearing and for Hearing and Motion for Conversion of Chapter 13 Case to Chapter 7 Case, Memorandum, and proposed Order on the individual(s) listed below, in the manner described:

**By facsimile transmission:**

United States Trustee  
612-664-5516  
Paul E. Ross, Esq.  
952-496-1728

**By U.S. Mail, postage prepaid:**

Paul E. Ross, Esq.  
287 Marschall Road, Suite 203-A  
Shakopee, MN 55379

James M. Mulvihill  
921 South Elm Street  
Belle Plaine, MN 56011

Kathleen M. Mulvihill  
20529-485<sup>th</sup> Street  
McGregor, MN 55760

William J. Egan, Esq.  
5200 Willson Road  
Edina, MN 55424

And I declare, under penalty of perjury, that the foregoing is true and correct.

Executed: September 17, 2004

/e/ Margaret H. Culp

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**ORDER CONVERTING CASE TO CHAPTER 7**

At St. Paul, MN \_\_\_\_\_, 2004.

The above-entitled matter came before the undersigned United States Bankruptcy Judge on the motion of the Chapter 13 Trustee for conversion of this case to a case under Chapter 7.

Appearances were noted in the minutes.

Upon the verified motion and attachments, the arguments of counsel, all of the files, records and proceedings herein, and upon findings of fact and conclusions of law, if any, read into the record,

IT IS ORDERED:

The Trustee's motion is **GRANTED**; this case is converted to a case under Chapter 7.

\_\_\_\_\_  
Gregory F. Kishel  
Chief United States Bankruptcy Judge